UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY, et al.,)
)
Plaintiffs,)
)
vs.) No. 4:09-CV-00686(ERW)
)
E.I. DUPONT DE NEMOURS & COMPANY,)
et al.,)
)
Defendants.)

MOTION HEARING

BEFORE THE HONORABLE E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

September 2, 2009

APPEARANCES:

FOR PLAINTIFF: DAN K. WEBB
WINSTON & STRAWN, LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

JOHN J. ROSENTHAL
WINSTON & STRAWN, LLP
1700 K Street, NW
Washington, DC 20006
(314) 539-2200

JOSEPH P. CONRAN
GREG G. GUTZLER
HUSCH, BLACKWELL, SANDERS, LLP
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
(314) 480-1500

STEVEN G. SPEARS
MCDERMOTT & WILL
1000 Louisiana Street, Suite 3900
Houston, TX 77002-5005
(713) 653-1700

FOR DEFENDANTS: JAMES P. DENVIR, III
AMY J. MAUSER
BOIES, SCHILLER & FLEXNER, LLP
5301 Wisconsin Avenue, Suite 800
Washington, DC 20015
(202) 237-2727

LEORA BEN-AMI
THOMAS F. FLEMING
KAYE SCHOLER, LLP
425 Park Avenue
New York, NY 10022
(212) 836-7203

C. DAVID GOERISCH
LEWIS, RICE & FINGERSH
500 N. Broadway, Suite 2000
St. Louis, MO 63102-2147
(314) 444-7600

COURTROOM CLERK: MARY GRACE BECKER

REPORTED BY: DEBORAH A. KRIEGSHAUSER, FAPR, RMR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7449

(PROCEEDINGS BEGAN AT 9:00 AM.)

THE COURT: Good morning.

COUNSEL OF RECORD: Good morning, Your Honor.

THE COURT: Once more onto the breach we go.

Monsanto Company and others versus E.I. DuPont and others; 4:09-CV-00686(ERW).

The matter comes before the Court today on Plaintiffs', Monsanto Company and Monsanto Technology, LLC's, Motion to Stay Discovery and for Separate Trial of Defendants' Antitrust Counterclaims, Document No. 35.

In their motion, Plaintiffs ask that the Court stay discovery on the antitrust counterclaims filed by Defendants until resolution of Plaintiffs' patent and contract claims. Additionally, Plaintiffs ask that the antitrust counterclaims be tried separately.

Plaintiffs state that it is common practice for Courts to sever antitrust claims and patent claims to simplify issues and reduce the risk of jury confusion. Plaintiffs note that patent claims are less complex and require less discovery and will be ready for trial earlier. Plaintiffs state that the antitrust counterclaims depend upon issues at the core of the patent claims and resolving the patent claims first will moot or simplify the antitrust counterclaims.

Defendants respond that granting this motion would substantially delay the resolution of this case and assert

that Plaintiffs' current actions to extend its monopoly power require an expedited briefing and trial schedule on these counterclaims. Defendants state that many of their antitrust counterclaims are not dependent on Plaintiffs' patent claims and assert that the law does not support a stay where patent claims would not be dispositive of all of the antitrust claims.

Plaintiffs reply that the vast majority of Defendants' antitrust counterclaims would be mooted by the resolution of their contract and patent claims and state that Courts frequently stay discovery even where resolution of the patent claims will not dispose of all antitrust counterclaims.

Plaintiffs ready?

MR. CONRAN: Good morning, Your Honor.

THE COURT: Good morning. Plaintiffs ready?

MR. CONRAN: We're ready.

THE COURT: Defendants ready?

MR. DENVIR: We are, Your Honor.

THE COURT: Good morning. Whenever you're ready

MR. CONRAN: I'd like to introduce to the Court Dan Webb, a good friend, who is going to be handling the motion on this issue. All right?

THE COURT: All right. Good morning, Mr. Webb.

MR. WEBB: Good morning, Your Honor. Thank you allowing me to appear and argue this motion.

EXHIBIT A

our affirmative *Walker Process* claim.

These factual allegations, Your Honor, which account for 49 of the 104 of the allegations of anticompetitive conduct in the case, are, in fact, the most factually complex, discovery-intensive disputed facts in this litigation. Everything else will pale in comparison to the complexity and the difficulty of that discovery, and that's going to take place no matter what.

Now we enter, again using Monsanto's categories, categories of Anticompetitive Conduct as to which there is no dispute that discovery will eventually be necessary at some point. So, again, we have patent fraud which we just discussed; the sham litigation which we just discussed; the Dow-Monsanto agreement. That's an additional 14 out of the 104 allegations of fact and the switching strategy which is another 7 out of the 104. So that's 70 out of the 104 allegations, Your Honor, as to which discovery is going to take place no matter what happens. It's just a question of when.

Now you'll note in the middle column opposite "Switching Strategy" that we put in parentheses "excluding Paragraphs 137 to 143," and we've noted that because Monsanto doesn't count those paragraphs anywhere. What those paragraphs involve, Your Honor, ---

THE COURT: Just a second. Where are you now?

MR. DENVIR: I'm sorry. "Eventual Discovery Necessary - Undisputed."

THE COURT: All right.

MR. DENVIR: And if you look down to "Switching Strategy," the paragraphs of the counterclaims that have been identified by Monsanto, 179 through 185, do not include, nor does any other category in Monsanto's chart, include Paragraphs 137 to 143. And I just wanted to tell you what -- Those paragraphs are the paragraphs that allege that the independent seed companies are a critical, essential, necessary distribution channel for developers of traits. That is a key -- Those are key sets of allegations, Your Honor, in antitrust terms, and Monsanto concedes that those have to go forward as well. So we're really talking about 77 out of the 104 paragraphs of the counterclaims that allege anticompetitive conduct as to which discovery will be necessary at some point.

Now when you talk about efficiency, Your Honor, "efficiency" means potentially avoiding unnecessary discovery. It does not mean delaying discovery that's going to happen no matter what, and that's essentially what Monsanto is arguing for here today.

We then have the final category, Your Honor, "Discovery Necessary," but it's our position that Monsanto disputes that, and that includes the remainder of those -- of

those categories of anticompetitive conduct.

Now the reason we disagree with Monsanto's position, Your Honor, that discovery will not be necessary with respect to those claims is that they are all part of our allegations of the switching strategy. If you look at the next page, Your Honor, we tried to demonstrate this graphically.

When Monsanto refers to the "ISC switching strategy," they suggest, I think, Your Honor, that these are some isolated, disconnected sort of allegations that we just threw in the Complaint. As a matter of fact, Your Honor, the Complaint says that we bring this action -- that's in the yellow box on top -- "DuPont and Pioneer bring this action to arrest a new anticompetitive scheme by Monsanto designed to force ISCs to switch from Roundup Ready® 1 to Roundup Ready® 2 Yield prior to the expiration of the patents." So it's not some isolated, off-to-the-side set of allegations. This is the centerpiece of our case.

It is then alleged, Your Honor, in Paragraph 3 of the counterclaims, "The unlawful scheme described herein" -- that's the switching scheme -- "has five key related components each by itself anticompetitive and each contributing to the exclusionary effects of the whole."

And what are those five? They're the five categories of anticompetitive conduct that Monsanto says, "Well, these are field-of-use restrictions," so the Court need not -- If we

went on -- if we went on the patents then, the Court will never need to consider these issues, but we disagree with that. We think, Your Honor, the discovery will be necessary as to those parts of an overall -- overarching scheme, regardless of the outcome on the patent issues.

Now we address that on the next page of this -- these demonstratives, Your Honor.

We respectfully submit, Your Honor, that the switching strategy cannot be viewed in isolation from its various components, and those components are the five categories as to which Monsanto claims discovery will not be necessary.

It has long been held that even if individual elements of an alleged anticompetitive scheme are legal, taken outside of the context of monopoly power and taken outside of the context of the synergistic effects of that scheme, that if there are effects taken as a whole that are exclusionary within the meaning of Section 2 of the Sherman Act, then they violate Section 2, taken as a whole, even if individually, each of those -- each of those acts viewed in isolation might be legal.

Our Complaint -- Our counterclaims, Your Honor, allege that you can't view these -- these acts in isolation here. The Complaint alleges that they are all part of a scheme; that they're interrelated and that they operate

synergistically. So we would submit, Your Honor, that no matter what the outcome on the patent case is, on the patent case we're going to have to take discovery on these five remaining categories as well which means virtually a hundred percent.

I want to make one comment. We've heard today and in the briefing that's been done in this case the term "field of use" as sort of a callusment (ph); if it's -- if it's a -- if it's a field of use, then it's somehow blessed and no longer subject to antitrust scrutiny. Well, it's not quite that simple. Number one, we will dispute whether these are actually field-of-use restrictions or not. But, second, even if they are, the Federal Circuit in *B. Braun*, B-R-A-U-N, *Medical v. Abbott Labs*, which is at 124 F3d 1419 at 1426, Federal Circuit case, stated that field-of-use restrictions are generally upheld. It then went on to note, however, that quote, "Any anticompetitive effects they may have are analyzed under the rule of reason," closed quote.

So we will -- we will argue during the course of this case, Your Honor, that these are -- number one, these are not field-of-use restrictions and, number two, even if they are, they -- they have to be evaluated under the rule of reason. And third, they cannot be viewed in isolation. They have to be viewed as an integrated whole and in the way they operate together synergistically. So that's the story on efficiency,

Your Honor -- on switching; on -- I'm sorry; on the stay.

Now as I said, Your Honor, the second reason or the third reason we believe that a stay is inappropriate here is that it would cause real prejudice. Now you heard this morning that we've sat on our rights and that these license restrictions go back years and years and years. The switching strategy is new, and it has arisen with the pending/impending expiration of the Roundup Ready® patent. So it's -- We have not sat on our rights, Your Honor. This is -- This is not only something that's new but it's taking place as we speak.

The Complaint alleges that Monsanto is currently coercing ISCs to switch from Roundup Ready® 1 to Roundup Ready® 2. The Complaint alleges that they have been told they need to destroy their Roundup Ready® 1 seed lines. So before the patent expires, Monsanto's goal is to have everybody switched to Roundup Ready® 2. Roundup Ready® 1 seed lines will be destroyed. What that means is that when the patent expires, there's not going to be any possibility of generic competition certainly by the ISCs or by the ISCs as a distribution channel for other trait developers, and that's -- that's ongoing. Once that happens, Your Honor, we believe that once the ISCs completely switch from Roundup Ready® 1 to Roundup Ready® 2, that that conversion will become effectively irreversible. So there is real imminent danger, Your Honor, and it's real prejudice not only to -- not only Pioneer and

DuPont who are going to try to sell traits, license traits to these independent seed companies, but to the public interest.

Now, finally, Your Honor, on the issue of separate trials, Mr. Webb said earlier that there won't be two trials of the antitrust claims in this case no matter -- no matter -- there will not be two trials of the --

THE COURT: Patents?

MR. DENVIR: -- inequitable defense in the *Walker Process*. If Monsanto is willing to waive a second trial today, we'd be happy to take it, but the Courts have held that the elements of the two -- All of the facts may be precisely the same. The elements of the two are different.

If you look, Your Honor, at Page 6 of this outline, the heading is "Bifurcated Trials Is Redundant." We cite the *Climax Molybdenum v. Molychem* case which is at 414 F.Supp. 2d, 1007. This is the law generally, but this is a clear articulation of the law. In rejecting bifurcation, the Court held that, "Bifurcation would result in duplication and inefficient use of judicial resources. Although there is considerable overlap between the issues of inequitable conduct and the fraud necessary to establish a *Walker Process* antitrust claim, the elements are not identical. Thus, if Molychem were to prevail on its defense on inequitable conduct during a separate trial of the patent issues, no issue preclusion would result from that determination. A subsequent

trial of Molychem's *Walker Process* counterclaims would require another evidentiary presentation about Climax's alleged fraud on the Patent Office. In this case, a single trial of the patent and antitrust issues would promote the objectives of efficiency and fairness."

We would suggest that the same is true here, Your Honor. Not only is there a large overlap but the factual issues, the evidence is virtually the same; the same witnesses, same documents. And if we prevail on our inequitable conduct claim, I bet you almost anything that Monsanto is going to come in the next day and say, "Well, wait a minute. We get a new trial on the antitrust claim because the standards are different," and they are. So if we prevail, Your Honor, we're going to have two trials. There's no question about it.

I assume there's no more dispute about whether we get a jury trial on the inequitable conduct claim because that is absolutely clear law. So what we end up having potentially is not a savings but we have -- we have two virtually identical trials before two different juries on the same factual issues. I would suggest to Your Honor that that is not a model of efficiency. It's a prescription for inefficiency and waste and delay. And if the Court would want -- If there's a way for the Court to guarantee that this case will stay on its docket for a very, very long time, the way to do that is to